Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-455

In the Supreme Court of the United States

OCTOBER TERM, 1981

GRACE BRETHREN CHURCH, ET AL.,
CROSS-APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO DISMISS

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

MARK C. RUTZICK
F. JAMES FOLEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Abington School District v. *Schempp*, 374 U.S. 203 2

Basic Unit Ministry of Alma Karl Schurig v. *United States*, 511 F. Supp. 166 4

Braunfeld v. *Brown*, 366 U.S. 599 3

Everson v. *Board of Education*, 330 U.S. 1 3

NAACP v. *Button*, 371 U.S. 415 5

Parker v. *Commissioner*, 365 F. 2d 792, cert. denied, 385 U.S. 1026 4

Sherbert v. *Verner*, 374 U.S. 398 5

Constitution and rules:

United States Constitution, First Amendment 4, 5

Establishment Clause 1

Free Exercise Clause 1, 2, 3

Sup. Ct. R. :

Rule 10.5 2

Rule 12.4 1

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-455

GRACE BRETHREN CHURCH, ET AL.,
CROSS-APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO DISMISS

This cross-appeal was filed in connection with *United States* v. *Grace Brethren Church*, No. 81-228 (Cross-J.S. 2).[1]

1. Cross-appellants argue that the district court incorrectly rejected their claim that the Federal Unemployment Tax Act (FUTA), as applied to employees of religiously oriented schools not affiliated with any church, violates the Free Exercise Clause of the First Amendment. The district court instead relied on the Establishment Clause of the First Amendment in holding the statute unconstitutional as applied to those schools (81-228 J.S. App. 66a-76a). In so

---

[1]The State of California, *et al.*, have also perfected an appeal from the same decision, No. 81-31, but the cross-appeal was filed substantially more than 30 days after the filing of the State's Jurisdictional Statement on July 8, 1981, and thus would not be a timely cross-appeal from that appeal. See Sup. Ct. R. 12.4.

doing, it simply rejected one of the alternative rationales on which cross-appellants based their claim that the statute could not constitutionally be applied to them. Cross-appellants do not seek to expand the relief awarded by the judgment below.

Rule 10.5 of the Rules of this Court provides that "an appellee, without filing a cross-appeal, [may] defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted." It was accordingly unnecessary for cross-appellants to file their cross-jurisdictional statement in order to preserve their contention that FUTA, as applied to non-affiliated but religiously oriented schools, violates the Free Exercise Clause of the First Amendment.

2. That contention is, in any event, without merit. In order to demonstrate that legislation is in conflict with the Free Exercise Clause, one must show "the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). In the case at hand, the coverage of employees of religiously oriented non-church schools involves neither the taxing of the practice of religion nor any other "coercive effect."[2]

But FUTA and the complementary state law, the California Unemployment Insurance Code, are neutral, social welfare legislation. These laws form one part of the federal-state unemployment compensation system that protects working persons, their families and their communities

---

[2]Cross-appellants incorrectly suggest that the tax imposes a burden on "religious institutions," "religious activities," "religion" or "religious ministries" (Cross-J.S. 6-12). The only question before the Court is whether the employees of schools that are not affiliated with any church are covered by the FUTA. It is conceded that the Act does not apply to the employees of church affiliated schools, much less to religious institutions themselves (81-228 J.S. 6 n.5).

against the ill effects of sudden unemployment. This unemployment compensation system has, at most, only an indirect and incidental effect on the exercise of religion. Accordingly, cross-appellants carry a heavy burden in challenging the application to them of FUTA and the corresponding provisions of the California Code. As this Court has characterized that burden:

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.

Braunfeld v. *Brown*, 366 U.S. 599, 606 (1961). Cross-appellants' position does not withstand such critical scrutiny in the present case.

First, as the court below noted, "the record as a whole does not support the conclusion that the effect of the additional financial burden will be significantly harmful" (81-228 J.S. App. 59a). As this Court has stated, the mere fact that for certain individuals or entities a statute "operates so as to make the practice of their religious beliefs more expensive" is not grounds for striking it down. *Braunfeld* v. *Brown, supra*, 366 U.S. at 605. Thus, cross-appellants' argument that the imposition of the FUTA tax unconstitutionally burdens their religious activities is without basis in either fact or law.[3]

---

[3]Indeed, in the present context an equally plausible Free Exercise claim could be made if Congress had chosen to exclude the employees of schools such as cross-appellants, "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation" such as protection under the unemployment insurance program. *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947) (emphasis in Court's opinion).

The tax is, in any case, not a tax on a religious ministry or religious acts. Rather, the tax is on the employment relationship between California employers and their employees—including those employers who operate religiously oriented, non-church schools. Thus, cross-appellants can no more claim a First Amendment exemption from the unemployment tax than they could from the assessment of income or social security taxes based on such employment. As the court below properly decided:

> To hold otherwise would be to adopt the view that any thing or activity remotely connected to the exercise of religion or to those who engage in it is constitutionally immunized from taxation. That no such view was intended by the United States Supreme Court in *Murdock* and *Follett, supra,* is demonstrated by *dicta,* in both cases, expressly approving the taxation of the income of ministers or of church property (*Murdock, supra,* 319 U.S. at 112; *Follett, supra,* 321 U.S. at 578).

81-228 J.S. App. 62a. Accord, *Parker* v. *Commissioner,* 365 F. 2d 792, 795 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967); *Basic Unit Ministry of Alma Karl Schurig* v. *United States,* 511 F. Supp. 166, 168-169 (D.D.C. 1981).

Finally, even if there were any merit to cross-appellants' contention that FUTA has a coercive effect on the exercise of their religion, such an effect would be counter-balanced by the compelling governmental interests served by FUTA. The district court, recalling the tragic economic history that led to the enactment of FUTA, concluded:

> [A]nyone having the slightest familiarity with the history of the Great Depression can have no doubt that the interest which the various unemployment compensation statutes have been designed to serve is a compelling one.

81-228 J.S. App. 65a. Thus, assuming, *arguendo*, that FUTA has some coercive effect on the exercise of religion, it is still valid under the First Amendment because it is justified by "a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.' " *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963), quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

It is therefore respectfully submitted that the cross-appeal should be dismissed.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

MARK C. RUTZICK
F. JAMES FOLEY
Attorneys

OCTOBER 1981

DOJ-1981-10